E. A. Renfroe & Company Inc. *and* Kimani Adams.
Case 10–CA–171072

December 16, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On August 17, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this supplemental decision and to adopt the recommended Order as modified and set forth in full below.[1]

The Respondent employs project employees, whom it deploys to its client insurance companies during times of disaster or claims overload. On February 17, 2016,[2] the Respondent electronically sent its project employees, including Charging Party Kimani Adams, a "Mutual Agreement to Arbitrate Employment-Related Disputes" (MAA), relevant portions of which are set forth below. Project employees, including Adams, were required to sign the MAA as a condition of employment. On March 29, the Respondent issued its project employees a revised arbitration agreement, which included language omitted from the MAA providing that employees retained the right to file complaints with the National Labor Relations Board. There is no allegation that the revised arbitration agreement unlawfully interfered with employees' right to access the Board or its processes.

The MAA contained numbered paragraphs that read, in relevant part, as follows:

> 1. Intent. The Parties intend for this Agreement to govern the resolution of all disputes, claims, and other matters in question arising out of or relating to the Parties' employment relationship. The parties shall resolve all disputes, claims, and other matters in question arising out of the employment relationship in accordance with the provisions of this Agreement.
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> 2. Mandatory Arbitration. The Parties agree that all grievances, claims, complaints, disputes, or causes of action (collectively, "Claims") that relate in any way to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients, whether based in contract, tort, fraud, misrepresentation, state or federal statutory law, or any other legal theory, shall be submitted to binding arbitration … .
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> 3. Covered Claims. The Parties are mutually obligated to arbitrate all claims arising out of or relating to their employment relationship. This Agreement covers all Claims in a federal, state, or local court or agency under applicable federal, state, or local laws, arising out of or relating to Employee's employment with Employer, performance of work for the Employer's clients, or the termination of Employee's employment. … The Claims covered by this Agreement include, but are not limited to … claims for violation of any federal, state, or other governmental law, statute, regulation or ordinance … .
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> 4. Claims Not Covered. This Agreement does not cover claims for workers' compensation, unemployment compensation benefits, or any other claims that, as a matter of law, the parties cannot agree to arbitrate.

The MAA also contained language waiving class- and collective-action procedures. On February 24, after the Respondent and Adams exchanged emails about the MAA, the Respondent released Adams from her work assignment in Georgia for refusing to sign the MAA.[3]

Relying on *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) by maintaining the MAA because it required employees to waive their right to pursue class or

[1] We have amended the remedy and modified the judge's recommended Order consistent with our findings herein. We shall substitute a new notice to conform to the Order as modified.

[2] All dates are 2016 unless otherwise indicated.

[3] Adams' assignment was scheduled to end on or about June 24. On April 5, the Respondent sent an email to Adams calling her attention to the March 29 revised arbitration agreement and stating that she would be eligible for deployment to future projects if she executed the revised agreement. For the reasons explained in this decision, we find that the Respondent violated Sec. 8(a)(1) when it released Adams from her work assignment because she refused to sign the MAA, and we shall order the Respondent, among other things, to make Adams whole for losses caused by this violation. We leave to compliance the determination of the duration of the backpay period.

collective actions in all forums. The judge also found that maintenance of the MAA was unlawful because, under the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), employees would reasonably read the MAA as barring or restricting them from filing charges with the Board. The judge further found that the Respondent violated Section 8(a)(1) by discharging Adams for refusing to sign the MAA.

On October 4, 2018, the Board issued a Decision, Order, and Notice to Show Cause in this case. The Board dismissed the allegation that the MAA unlawfully required employees to waive their right to pursue class or collective actions in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612, 1632 (2018), in which the Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). The Board also gave notice to the parties to show cause why the remaining issues in the case—concerning the Respondent's alleged restriction on employee access to the Board and its discharge of Adams—should not be remanded to the judge for further proceedings in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017).[4] The Respondent and the General Counsel each filed a response to the Notice to Show Cause. Neither requested that this case be remanded to the judge, and each provided further arguments on the merits of the remaining allegations. In view of the parties' responses, and since the remaining allegations may be decided based on the existing record, we find that a remand is unnecessary.

For the reasons explained below, we adopt the judge's findings that the Respondent's maintenance of the MAA and its discharge of Adams for refusing to sign the MAA violated Section 8(a)(1) of the Act.

Maintenance of the MAA

In *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board held that, notwithstanding the Supreme Court's decision in *Epic Systems*, above, upholding individual arbitration agreements containing class- and collective-action waivers, the FAA "does not authorize the maintenance or enforcement of agreements that interfere with an employee's right to file charges with the Board." Id., slip op. at 5. This is so because the FAA's requirement that arbitration agreements be enforced as written "may be 'overridden by a contrary congressional command,'" which the Board found to be established in Section 10 of the Act. Id. (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). Indeed, "[u]nder Section 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board's power to prevent unfair labor practices 'shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.'" Id.

Accordingly, the Board held that an arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful." Id. The Board further held that where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the Board must apply the standard set forth in *Boeing* and initially "determine whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.'" Id. (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3). The Board added that the "when reasonably interpreted" standard is an objective one and "looks solely to the wording of the rule, policy, or other provision at issue[,] . . . interpreted from the employees' perspective." Id., slip op. at 6 fn. 14.

Applying this standard, the Board found that the arbitration agreement in *Prime Healthcare* violated the Act because, although it did not explicitly prohibit charge filing (or the exercise of other Section 7 rights), it did, when reasonably interpreted, interfere with employees' right to file charges with the Board because its provisions, "taken as a whole, [made] arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." Id., slip op. at 6 (emphasis in original). Turning to the second, balancing step of the *Boeing* analysis, the Board held that, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id. Finally, the Board placed "provisions that make arbitration the exclusive forum for the resolution of all claims" in *Boe-*

[4] In *Boeing*, the Board overruled the "reasonably construe" prong of *Lutheran Heritage* and announced a new standard, which applies retroactively, for evaluating the lawfulness of a facially neutral policy. 365 NLRB No. 154, slip op. at 3. Under *Boeing*, the Board first determines whether a challenged rule or policy, when reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board evaluates two things: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." Id., slip op. at 3. The *Boeing* standard replaced the "reasonably construe" prong of *Lutheran Heritage*. Other aspects of *Lutheran Heritage* remain intact, including whether a challenged rule or policy explicitly restricts activities protected by Sec. 7. 343 NLRB at 646.

ing Category 3, which designates rules and policies that are unlawful to maintain. Id., slip op. at 7.

Here, setting aside for the moment the "Claims Not Covered" paragraph, the MAA plainly makes arbitration the exclusive forum for the resolution of statutory claims under the Act. It requires binding arbitration of all employment-related disputes, "whether based in . . . federal statutory law, or any other legal theory." Moreover, the MAA does not reference claims arising under the Act in the "Claims Not Covered" paragraph, and it does not contain a savings clause preserving employees' right to file charges with the Board or, more generally, with administrative agencies. It does, however, exclude from the scope of the MAA's otherwise exclusive arbitration mandate claims the parties cannot agree to arbitrate "as a matter of law." The Respondent contends that this exclusion renders the MAA lawful. For the following reasons, we disagree.

In *Cedars-Sinai Medical Center*, 368 NLRB No. 83 (2019), we considered whether a mandatory arbitration agreement that excluded from its scope claims "preempted by federal labor laws" unlawfully interfered with employees' access to the Board. To decide that issue, we applied a principle suggested by the General Counsel and recited in *Prime Healthcare*—namely, that "[v]ague savings clauses that would require employees to 'meticulously determine the state of the law' themselves are likely to interfere with the exercise of NLRA rights." Id., slip op. at 2 (quoting *Prime Healthcare*, 368 NLRB No. 10, slip op. at 3).[5] Doing so, we found that an objectively reasonable employee reading the language excluding claims "preempted by federal labor laws" "would not divine an implicit intent to exclude claims arising under the Act" because "[i]t is unlikely that such an employee would be familiar with the legal doctrine of preemption, let alone what actions and claims are preempted by federal labor laws." Id., slip op. at 2–3. We accordingly found that the arbitration agreement at issue in *Cedars-Sinai* restricted employee access to the Board, that it was a Category 3 policy under *Boeing*, and that maintenance of the agreement violated Section 8(a)(1).[6]

We find the General Counsel's suggested principle applicable here as well, although we note that the clause at issue is an exclusion clause, not a savings clause.[7] As in *Cedars-Sinai*, the clause in the MAA excluding claims the parties cannot agree to arbitrate "as a matter of law" constitutes the type of vague, generalized language that requires employees to meticulously determine the state of the law themselves. See *Cedars-Sinai*, above, slip op. at 2-3; see also *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."). Because the exclusion clause is legally insufficient, and because the MAA does not contain a valid savings clause preserving employees' right of access to the Board, the MAA unlawfully interferes with employees' right of access to the Board by making arbitration the exclusive forum for resolving claims arising under the Act, which is impermissible for the reasons explained in *Prime Healthcare*.[8]

We find without merit the Respondent's contention that dismissal of this allegation is warranted because of a lack of evidence that Adams (or other employees) either declined to file charges with the Board or believed the MAA precluded such activity. The "when reasonably interpreted" standard is an objective one and looks solely to the wording of the provisions at issue, not to the employer's or employee's conduct. *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 fn. 14. We also find the Respondent's asserted business justification for maintaining the MAA (e.g., to promote efficient dispute resolution) does not constitute a legitimate basis for restricting employees' access to the Board or its processes. Id., slip op.

[5] This principle additionally explains that "[s]uch clauses include, for example, those stating that 'nothing in this agreement shall be construed to require any claim to be arbitrated if an agreement to arbitrate such claim is prohibited by law,' or that exclusively require arbitration but limit that requirement to circumstances where a claim 'may lawfully be resolved by arbitration.'"

We did not otherwise pass in *Cedars-Sinai* on the merits of the General Counsel's suggested principles, and we do not do so here.

[6] See also *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3-4 (2019) (finding that a clause in the employee arbitration agreement excluding from arbitration claims or actions "where specifically prohibited by law" was legally insufficient to save the maintenance of the agreement and the discharge of an employee for refusing to sign it from violating Sec. 8(a)(1) of the Act).

[7] An exclusion clause in an arbitration agreement carves out or excludes certain claims or types of claims from the scope of the agreement. In contrast, a savings clause in an arbitration agreement provides that employees retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope.

[8] Our decision is limited to the MAA sent to project employees on February 17. An arbitration agreement previously issued by the Respondent to its home office employees on January 20 included the following sentence: "Nothing in this Agreement shall be interpreted to mean that employees are precluded from filing complaints with a federal agency, such as the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or any equivalent state agency." This language was omitted from the February 17 MAA sent to the project employees, including Adams, but it was added to the revised agreement the Respondent issued on March 29. Again, there is no allegation that either the January 20 home office agreement or the March 29 revised agreement unlawfully interfered with employees' right to access the Board and its processes.

at 6; see also *Alorica, Inc., and its subsidiary/affiliate Expert Global Solutions, Inc.*, 368 NLRB No. 25, slip op. at 2 (2019) (rejecting contention that arbitration agreement's interference with Section 7 rights was minimal or outweighed by the efficient resolution of workplace disputes).

In sum, the language of the MAA, when reasonably interpreted, made arbitration the exclusive forum for resolution of claims arising under the Act. The MAA restricted employee access to the Board, and such a restriction of Section 7 rights cannot be supported by any legitimate business justification. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the MAA.[9]

Respondent's Discharge of Adams

The judge found that the Respondent violated Section 8(a)(1) of the Act by releasing Adams from her work assignment on February 24 because she refused to sign the MAA. In addition to relying on its argument that the MAA was lawful, the Respondent contends on exception that the discharge did not violate Section 8(a)(1) because Adams refused to agree to provisions in the MAA that were not specifically alleged to be unlawful. We find no merit in this contention. There is nothing in the stipulated record showing that the Respondent would have permitted Adams to remain employed by consenting to certain other provisions not alleged to be unlawful. Instead, the facts simply show that the Respondent released Adams from her assignment for refusing to sign the MAA. Because the MAA was unlawfully maintained at that time, the Respondent could not lawfully discharge Adams for refusing to sign it. See *Alorica, Inc.,* above, slip op. at 1 fn. 3 (employer violated Section 8(a)(1) by discharging employees for refusing to sign its unlawful arbitration agreement). We accordingly affirm the judge's finding that the discharge violated Section 8(a)(1) as alleged.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully maintained a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the Board, we shall order that the Respondent, to the extent it has not already done so, to rescind the unlawful agreement and to advise its employees in writing that it has done so.

In addition, the Respondent shall make Kimani Adams whole for any loss of earnings and other benefits incurred as a result of her unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NRLB 6 (2010). The Respondent shall also compensate Kimani Adams for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Kimani Adams for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Because the record shows that the Respondent's project employees worked at various customer facilities, we shall require that the Respondent post the notice at its facility and also mail the notice to its employees who received the "Mutual Agreement to Arbitrate Employment-Related Disputes" while deployed to customer sites from February 17 to March 29, 2016. Such a remedy will serve to inform all affected employees of the action the Respondent is required to take to remedy the violations. See, e.g., *Technology Service Solutions*, 334 NLRB 116, 117–118 (2001) (notice ordered to be posted at all facilities and mailed to home addresses of traveling employees).

ORDER

The National Labor Relations Board orders that the Respondent, E. A. Renfroe & Company, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts

[9] Like the agreement at issue in *Cedars-Sinai*, the MAA is a "Category 3" policy under *Boeing*, 365 NLRB No. 154, slip op. at 4, 15.

Member McFerran joins her colleagues in finding that the Respondent violated Sec. 8(a)(1) by maintaining the MAA and by discharging Adams for failing to sign it. In doing so, she acknowledges that *Boeing Co.*, 365 NLRB No. 154 (2017), is currently governing law, and she applies it for institutional reasons only. Otherwise, she adheres to her dissent in that case.

their right to file charges with the National Labor Relations Board.

(b) Discharging employees for failing or refusing to sign a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind the "Mutual Agreement to Arbitrate Employment-Related Disputes" issued to project employees from February 17 to March 29, 2016, or revise it to make clear to employees that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the "Mutual Agreement to Arbitrate Employment-Related Disputes" issued to project employees from February 17 to March 29, 2016, that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days from the date of this Order, offer Kimani Adams full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Kimani Adams whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus reasonable search-for-work and interim employment expenses.

(e) Compensate Kimani Adams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kimani Adams, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Birmingham, Alabama facility copies of the attached notice marked "Appendix," and duplicate and mail, at its own expense, a copy of the notice to all project employees who received the Respondent's "Mutual Agreement to Arbitrate Employment-Related Disputes" while deployed to customer sites from February 17 to March 29, 2016.[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2019

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John F. Ring, Chairman

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that you reasonably would believe bars or restricts your right to file charges with the National Labor Relations Board.

WE WILL NOT discharge you for failing or refusing to sign a mandatory arbitration agreement that you reasonably would believe bars or restricts your right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory "Mutual Agreement to Arbitrate Employment-Related Disputes" issued to project employees from February 17 to March 29, 2016, or revise it to make clear that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the "Mutual Agreement to Arbitrate Employment-Related Disputes" issued to project employees from February 17 to March 29, 2016, that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Kimani Adams full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kimani Adams whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Kimani Adams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kimani Adams, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

E.A. RENFROE & COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-171072 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Matthew J. Turner, Esq., for the General Counsel.
K. Bryance Metheny (Burr & Forman LLP), Esq., of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge**.** The Respondent instituted a program which, among other things, allowed employees to bring their workplace grievances to an arbitrator for resolution. However, it required all employees, whether or not they used the program, to waive their right to file a group grievance or claim. The Act protects the right of employees to engage in concerted activities for their mutual aid and protection, and Respondent's requiring them to waive that right violates Section 8(a)(1).

Procedural History

This case began on March 4, 2016 when Kimani Adams, an individual, filed an unfair labor practice charge against the Respondent, E. A. Renfroe & Company, Inc., with Region 10 of the National Labor Relations Board. The Region docketed

the charge as Case 10–CA–171072 and conducted an investigation.

On April 26, 2016, the Regional Director for Region 16 issued a complaint and notice of hearing. The Respondent filed a timely answer.

On June 13, 2016, a hearing opened before me by telephone conference call. The parties waived their right to call and examine witnesses and submitted a stipulation of facts and related joint exhibits. After setting a July 18, 2016 deadline for filing briefs, I closed the hearing. The parties submitted timely briefs, which I have considered.

Admitted Allegations

In its answer and by stipulation, the Respondent admitted a number of allegations. Based on those admissions, I find that the General Counsel has proven the allegations raised in complaint paragraphs 1, 2(a), 2(b), 2(c), 3(a), 3(b), 4(c) and 4(d).

More specifically, I find that the unfair labor practice charge was filed and served as alleged. Further, I find that at all material times, the Respondent has been a Georgia corporation with an office and place of business in Birmingham, Alabama and has been engaged in the business of providing temporary support services to insurance companies. Moreover, I find that in conducting its operations during the 12-month period before the parties' June 13, 2016 stipulation, the Respondent performed services valued in excess of $50,000 in States other than the State of Georgia. Therefore, I conclude that the Respondent satisfies the statutory and discretionary standards for the exercise of the Board's jurisdiction. Further, I conclude that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent has admitted, and I find, that Human Resources Director and General Counsel Ashley Hattaway and Manager Teresa Gail Hitt are its supervisors and agents within the meaning of Section 2(11) and Section 2(13) of the Act.

Complaint paragraph 4(a) alleges that since at least February 17, 2016, Respondent has maintained a mandatory arbitration agreement, entitled "Mutual Agreement to Arbitrate Employment Related Disputes" (for brevity here called the arbitration agreement), that all of Respondent's employees are required to execute as a condition of employment. Some background information is helpful in understanding the Respondent's answer to this allegation.

Respondent provides temporary support services to insurance companies during times of disaster or claims overload. In other words, it is a type of business often called a "temp agency" or "temp service." When an insurance company is swamped with work, the Respondent will provide this client with temporary staffers to cope with the surge.

The Respondent's answer admits that it will not send an employee out to work for a client until the employee has signed the arbitration agreement but appears to deny that this requirement is a "condition of employment," as complaint paragraph 4(a) alleges. The Respondent contends that when an employee refuses to sign the arbitration agreement it does not result in the person losing her status as employee but only results in the person not receiving a work assignment.

However, the Respondent has not asserted, and the record does not establish, that a person who refuses to sign the arbitration agreement receives any pay. To the contrary, the Respondent stipulated that an employee who refused to sign the arbitration agreement was "released" from her assignment, has worked no further hours since that release, and has not received any pay except for the hours she had worked before that "release".

From this stipulation, I infer that employees only receive pay for work actually performed. Therefore, I conclude that the Respondent's refusal to send a person out to work in a client's office results in the individual receiving no pay. Thus, although the person retains the title of "employee" she is not *employed*—assigned gainful work—unless and until she signs the arbitration agreement. Accordingly, I conclude that the General Counsel has proven that signing the arbitration agreement is a condition of employment, as alleged in complaint paragraph 4(a).

Complaint paragraph 4(b) quotes specific language in a "mandatory arbitration" clause and alleges that, since at least February 17, 2016, this language has been included in the arbitration agreement. Because of an apparent typesetting anomaly, it is somewhat difficult to discern where paragraph 4(b) begins, which led the Respondent to conclude that the complaint did not contain a paragraph 4(b). Its answer therefore did not address the allegations in that paragraph.

However, the Respondent stipulated to the exact language of the arbitration agreement, including the "mandatory arbitration" clause. That language will be discussed below.

Complaint paragraph 4(c) alleges that the arbitration agreement has included, since at least February 17, 2016, a clause titled "Waiver of Class Action and Representative Action Claims" and further alleges that the clause contains specific quoted language. The Respondent has admitted this allegation and has stipulated to the entire contents of the arbitration agreement. Therefore, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 4(c).

Complaint paragraph 4(d) alleges that, since at least February 17, 2016, the Respondent's arbitration agreement has included a clause titled "Covered Claims" and sets forth the language alleged to be in that clause. The Respondent's answer admits this allegation. Therefore, I find that the General Counsel has proven the allegations raised in complaint paragraph 4(d).

Complaint paragraph 5(a) alleges that since about February 24, 2016, the Respondent has "required that employees sign the Arbitration Agreement or, if they did not sign, employees would be released from their project assignments." The Respondent's answer admits that it "required project employees to sign an arbitration agreement in order to be eligible for a temporary assignment" but denies other allegations raised in this complaint paragraph.

The Respondent's answer thus admits that it would not send an employer out to work in a client's office unless that person had signed an arbitration agreement. However, the Respondent *appears* to deny that it would pull an employee off an assignment where the employee *already* was working simply because the employee refused to sign the arbitration agreement.

However, the Respondent stipulated to facts establishing that it did retract a project assignment from an employee who refused to sign the arbitration agreement. This instance involves the Charging Party, Kimani Adams.

The Respondent hired Adams in 2012 and gave her assignments as a project employee in Georgia and Texas. The Respondent stipulated that in September 2014, it had deployed her to work on a project assignment in Georgia that was expected to last until June 24, 2016.

On February 17, 2016, the Respondent electronically sent to its project employees, including Adams, copies of a "Mutual Agreement to Arbitrate Employment Related Disputes." It required these employees to execute the arbitration agreement to remain eligible to work project assignments.

The Respondent stipulated that between February 22 and 26, 2016, it exchanged emails with Adams regarding the arbitration agreement and her employment status. On February 24, 2016, it released Adams from her project assignment because of her "failure and refusal to sign the Arbitration Agreement."

The Respondent further stipulated that since February 24, 2016, it has not assigned Adams any work hours or paid her any wages other than for hours she worked before that date. The complaint alleges that the Respondent thereby caused the termination of Adams' employment. However, the Respondent denies that it discharged her. According to the Respondent, Adams remains an employee, albeit one who does not receive work assignments or pay.

On March 29, 2016, the Respondent issued a revised arbitration agreement which now included language to make clear that employees retained the right to make complaints to the Board. On this same date, it issued a memo to employees who previously had signed arbitration agreements. This memo clarified that nothing in those arbitration agreements should be interpreted as preventing employees from filing complaints with the Board.

On April 5, 2016, the Respondent sent an email to Adams informing her of the revisions to the arbitration agreement and that she would be eligible for deployment to future projects if she decided to execute the revised arbitration agreement. The parties stipulated that, as of June 13, 2016, Adams had not executed the revised arbitration agreement and that Respondent had not deployed her to any projects since February 24, 2016.

The Issues

Although the facts are not disputed, the parties disagree about whether the Respondent acted lawfully. The complaint presents the following issues which must be resolved:

1. Would employees reasonably conclude that the provisions of the arbitration agreement precluded them from engaging in conduct protected by Section 7 of the Act? (Complaint paragraph 4(e).)
2. If so, did the Respondent thereby violate Section 8(a)(1) of the Act? (Complaint paragraph 6.)
3. Would the language of the arbitration agreement, as it existed before the March 29, 2016 revision, reasonably lead employees to conclude that they could not file unfair labor practice charges with the Board? (Complaint paragraph 4(f).)
4. If so, did the Respondent thereby violate Section 8(a)(1) of the Act? (Complaint paragraph 6.)
5. Did the Respondent's February 24, 2016 release of Adams from her project assignment, and its subsequent failure to give her other assignments, cause the termination of her employment? (Complaint paragraph 5(b).)
6. Did the Respondent release Adams from her project assignment and refuse to give her other assignments because she engaged in concerted activities protected by the Act, and to discourage employees from engaging in such activities? (Complaint paragraph 5(c).)
7. If so, did the Respondent thereby violate Section 8(a)(1) of the Act? (Complaint paragraph 6.)
8. If the Respondent violated Section 8(a)(1) of the Act, did such violation or violations affect commerce within the meaning of Section 2(2), (6) and (7) of the Act? (Complaint paragraph 7.)

The Arbitration Agreements (Complaint Paragraphs 4(a), 4(b), 4(c), and 4(d))

Agreement Sent to Home Office Employees

The parties stipulated that on January 20, 2016, the Respondent "electronically disbursed" to its home office employees a "Mutual Agreement to Arbitrate Employment-Related Disputes" and required those employees to execute this agreement. The parties introduced a copy of this arbitration agreement into the record. It states as follows:

> MUTUAL AGREEMENT TO ARBITRATE EMPLOYMENT RELATED DISPUTES
>
> This Mutual Agreement to Arbitrate Employment Related Disputes (the 'Agreement') is made and entered into as of _____ (the 'Effective Date') by and between E. A. Renfroe & Company, a Georgia Corporation, (the 'Employer') and _____, an individual (the 'Employee') (the Employer and the Employee are collectively referred to herein as the 'Parties;).
>
> 1. Intent. The Parties intend for this Agreement to govern the resolution of all disputes, claims, and other matters in question arising out of or relating to the Parties' employment relationship. The Parties shall resolve all disputes, claims, and other matters in question arising out of the employment relationship in accordance with the provisions of this agreement.
> 2. Mandatory Arbitration. The Parties agree that all grievances, claims, complaints, disputes, or causes of action (collectively, 'Claims') that relate in any way to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients, whether based in contract, tort, fraud, misrepresentation state or federal statutory law, or any other legal theory, shall be submitted to binding arbitration administered by the American Arbitration Association in accordance with the National Rules for the Resolution of Employment Disputes. The Rules are available online at www.adr.org. You can also call the American Arbitration Association at (888) 774-6904, if you have questions about

the arbitration process. If the National Rules for the Resolution of Employment Disputes are inconsistent with the terms of this Agreement, the terms of this Agreement shall govern.

3. Covered Claims. The Parties are mutually obligated to arbitrate all Claims arising out of or relating to their employment relationship. This Agreement covers all Claims in a federal, state, or local court or agency under applicable federal, state or local laws, arising out of or relating to Employee's employment with Employer, performance of work for the Employer's clients, or the termination of Employee's employment. This includes any Claims Employee may have against Employer, Employer's clients, or against Employer's or its clients' officers, directors, supervisors, managers, employees, or agents in their capacity as such or otherwise. Employee acknowledges that Employee's performance of work for Employer's clients is an integral component of Employee's work for Employer and specifically agrees that Employer's clients, as well as the client's officers, directors, supervisors, managers, employees, and agents are third party beneficiaries of this Agreement. This Agreement also includes any Claims that Employer may have against Employee. The Claims covered by this Agreement include, but are not limited to: (1) claims for breach of any contract or covenant (express or implied); (2) tort claims; (3) claims for wrongful termination (constructive or actual) in violation of public policy; (4) claims for discrimination or harassment, including, but not limited to, harassment or discrimination based on race, color, sex, gender, religion, national origin, alienage or citizenship status, creed, age, marital status, partnership status, military status, predisposing genetic characteristics, medical condition, psychological condition, mental condition, criminal accusations or convictions, disability, sexual orientation, or any other trait or characteristic protected by federal, state or local law; and (5) claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, including, but not limited to, all claims arising under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Fair Labor Standards Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Employee Retirement Income Security Act, the Equal Pay Act, the Civil Rights Act of 1991, 42 U.S.C. ' 1981, the Sarbanes-Oxley Act of 2002, the Worker Adjustment and Retraining Notification Act, the Uniformed Services Employment and Reemployment Rights Act, the Genetic Information Nondiscrimination Act, and claims for wages or other compensation due ('Covered Claims'). The Parties also specifically agree that the Covered Claims include all Claims under the California Labor Code and the California Wage Orders, including, but not limited to, claims for overtime, unpaid wages, and claims involving meal and rest breaks.

4. Claims Not Covered. This Agreement does not cover claims for workers' compensation, unemployment compensation benefits, or any other claims that, as a matter of law, the Parties cannot agree to arbitrate. The Parties agree that either party shall be entitled to seek injunctive or other equitable relief in a court of competent jurisdiction for any alleged breach of the Parties' Employment Agreement, enjoining any such breach. Unless otherwise agreed by the Parties, however, any claim for monetary damages associated with such alleged breach must be pursued by the parties through binding arbitration. Nothing in this Agreement shall be interpreted to mean that employees are precluded from filing complaints with a federal agency, such as the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or any equivalent state agency.

5. Waiver of Class Action and Representative Action Claims. Except as otherwise required under applicable law, the Parties agree that class action and collective action procedures are waived, and shall not be asserted, nor will they apply, in any arbitration (or dispute adjudicated in any other forum) pursuant to this Agreement. Employee agrees that Employee will not serve as a representative member of any class or collective action, or participate in any class action or collective action claim or procedure instigated by any other person. The Parties also agree that, to the extent permitted by law, they will be precluded from asserting in arbitration, or any other forum, any representative claims. This Waiver of Class Action and Representative Action Claims and the Waiver of Trial by Jury in Section 6 of this Agreement shall also apply to all claims by Employee against Employer's clients as well as the clients' officers, directors, supervisors, managers, employees and agents.

6. Waiver of Trial by Jury. The Parties understand and fully agree that, by entering into this Agreement, they are giving up their constitutional right to have a trial by jury and are giving up their normal rights of appeal except as governing law provides for judicial review of arbitration proceedings. The parties anticipate that by entering into this Agreement, they will gain the benefits of a faster and less expensive dispute resolution procedure.

7. Claims Procedure. Either party may initiate arbitration by providing express written notice to the other party. The initiating party must give written notice of any claim to the other party. Written notice of an Employee's claim shall be mailed by certified or registered mail, return receipt requested, to the Employer's General Counsel at 1600 Corporate Drive, Birmingham, AL 35242 ('Notice Address'). Written notice of the Employer's claim will be mailed to the last known address of Employee. The written notice shall identify and describe the nature of all claims asserted and the facts upon which those claims are based. Written notice of arbitration shall be initiated within the greater of one year from the date of the incident giving rise to the Claim or the statutory limitations period that governing law applies to the Claim.

8. Arbitrator Selection. The Arbitrator shall be selected as provided in the National Rules for the Resolution of Employment Disputes.

9. Arbitration Procedures. As stated, the National Rules for the Resolution of Employment Disputes shall generally govern any arbitration under this Agreement. Those rules notwithstanding, any arbitration under this Agreement shall take place in the state and county where the Employee resides at the time of the arbitration. For claims of less than ten thousand dollars ($10,000.00), the Employee shall be entitled to elect for arbitration in person, by telephone, or by submissions. In addition, either party may sue in small claims court

in lieu of arbitration, provided the claim fits within the scope of the jurisdictional rules of the applicable small claims court.
10. Discovery. The American Arbitration Association rules regarding discovery shall apply to arbitration under this Agreement. The Arbitrator selected according to this Agreement shall decide all discovery disputes.
11. Substantive Law. Unless otherwise required by the law of the state in which the wrongful conduct is alleged to have occurred, the Arbitrator shall apply federal law and the substantive law of the State of Alabama (including the law of the State of Alabama as to remedies) as applicable to the claim(s) asserted. The Arbitrator shall conduct and preside over an arbitration of reasonable length, to be determined by the Arbitrator. The Arbitrator shall provide the parties with a written decision explaining his or her findings and conclusions. The Arbitrator shall have authority to grant any form of relief, including injunctive relief, that would have been available to the Parties had the Claim been litigated in a court of competent jurisdiction.
12. Motions. The Arbitrator shall have jurisdiction to hear and rule on prehearing disputes and is authorized to hold prehearing conferences by telephone or in person as the Arbitrator deems necessary. The Arbitrator shall have the authority to set deadlines for completion of discovery and for filing motions for summary judgment, and to set briefing schedules for any motions. The Arbitrator shall have the authority to adjudicate any cause of action, or the entire claim, pursuant to a motion for summary adjudication and/or summary judgment, and, in deciding the motion, shall apply Alabama law.
13. Compelling Arbitration/Enforcing Award. Either party may bring an action in court to compel arbitration under this Agreement and to confirm, vacate, or enforce an arbitration award. Each party shall bear its own attorney fees and costs and other expenses of such an action.
14. Arbitration Fees and Costs. The Employer shall be responsible for the arbitrator's fees and expenses. Each party shall pay its own costs and attorney's fees, if any. If, however, the Employee prevails on a statutory claim which afford the prevailing party attorney's fees and costs, or if there is a written agreement providing for attorneys' fees and costs, the Arbitrator may award reasonable attorneys' fees and costs to the prevailing Employee. The Employer shall not be entitled to recover its attorney's fees and costs. Any dispute as to the reasonableness of any fee or costs shall be resolved by the Arbitrator.
15. Term of Agreement. This Agreement shall survive the termination of Employee's employment. It may not be changed, modified, or discharged orally, but only by an instrument in writing, that is signed by the Parties, which specifically states an intent to revoke or modify the terms of this Agreement.
16. Severability. If any provision of this Agreement is held to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and the adjudication shall not affect the validity of the remainder of this Agreement.
17. Voluntary Agreement. By signing this Agreement the Parties represent that they have been given the opportunity to consult with counsel and to fully review, comprehend, and negotiate the terms of this Agreement. The Parties understand the terms of this Agreement and freely and voluntarily sign this Agreement. The Parties understand and agree that this Agreement does not alter the at-will nature of their employment relationship and that either the Employer or the Employee may terminate the employment relationship at any time, with or without cause or notice.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date above.
[Signature lines omitted.]

Agreement Sent to Project Employees

As noted above, Respondent required its home office employees to sign this agreement. However, Charging Party Adams was not a home office employee but one of Respondent's "project employees," those sent out to work at various clients' offices. On February 17, 2016, 4 weeks after it issued arbitration agreements to its home office employees, the Respondent sent arbitration agreements to its project employees.[1]

The arbitration agreement given to project employees is not identical in all respects with that given to home office employees, but the wording of the two documents is quite similar and I discern no difference having legal significance. Although the agreement given to home office employees has been set forth above in its entirety, it suffices here to quote verbatim only those portions of the project employees' agreement specifically quoted in the complaint.

As alleged in complaint paragraph 4(b), the arbitration agreement which Respondent sent to its project employees on February 17, 2016 included the following "Mandatory Arbitration" clause:

> **Mandatory Arbitration.** The Parties agree that all grievances, claims, complaints, disputes, or causes of action (collectively, "Claims") that relate in any way to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients, whether based in contract, tort, fraud, misrepresentation, state or federal statutory law, or any other legal theory, shall be submitted to binding arbitration administered by the American Arbitration Association in accordance with the Employment Arbitration Rules and Mediation Procedures. The Rules are available online at www.adr.org. You can also call the American Arbitration Association at (888) 774-6904 if you have questions about the arbitration process. If the Employment Arbitration Rules and Mediation Procedures are inconsistent with the terms of this Agreement, the terms of this Agreement shall govern.

The arbitration agreement which the Respondent sent to its project employees on February 17, 2016 also includes language

[1] Because the project employees were working away from the home office at various clients' places of business, the Respondent transmitted the agreement to them electronically and allowed the employees to "sign" them electronically.

purporting to waive the employee's right to use "class action" or "collective action" procedures. Complaint paragraph 4(c) alleges, the Respondent has admitted, and I find, that this agreement includes the following language:

> **Waiver of Class Action and Representative Action Claims.** Except as otherwise required under applicable law, the Parties agree that class action and collective action procedures are waived, and shall not be asserted, nor will they apply, in any arbitration (or dispute adjudicated in any other forum) pursuant to this Agreement. Employee agrees that Employee will not serve as a representative member of any class or collective action, or participate in any class action or collective action claim or procedure instigated by any other person. The Parties also agree that, to the extent permitted by law, they will be precluded from asserting in arbitration, or any other forum, any representative claims. This Waiver of Class Action and Representative Action Claims and the Waiver of Trial by Jury in Section 6 of this Agreement shall also apply to all claims by Employee against Employer's clients as well as the clients' officers, directors, supervisors, managers, employees, and agents.

The arbitration agreement does not define what it means by "collective action." A labor lawyer might well understand the term to refer to a lawsuit brought pursuant to Section 216(b) of the Fair Labor Standards Act, which states, in part, "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Such a "collective action" under the Fair Labor Standards Act therefore bears a resemblance to a class action under Rule 23 of the Federal Rules of Civil Procedure.

Presumably, most of the Respondent's employees are not labor lawyers and therefore would not reflexively associate the words "collective action" with the Fair Labor Standards Act. At one point, the arbitration agreement does mention this statute, but does so in a list of laws which might be the source of claims. However, the arbitration agreement does not specifically associate the words "collective action" with that statute. Therefore, I conclude that employees reading the arbitration agreement reasonably would believe that "collective action" referred to any legal action brought by or seeking a remedy for more than one employee.

In addition to the waiver language quoted above, this arbitration agreement created an obligation for the Respondent and the employee to arbitrate "all Claims arising out of or relating to their employment relationship" followed by a further description of some types of claims. This obligation to arbitrate appears in a clause titled "Covered Claims" which is quoted in the complaint. Specifically, complaint paragraph 4(d) alleges, the Respondent has admitted, and I find, that the agreement includes the following:

> **Covered Claims**. The Parties are mutually obligated to arbitrate all Claims arising out of or relating to their employment relationship. This Agreement covers all Claims in a federal, state, or local court or agency under applicable federal, state, or local laws, arising out of or relating to Employee's employment with Employer, performance of work for the Employer's clients, or the termination of Employee's employment. This includes any Claims Employee may have against Employer, Employer's clients, or against Employer's or its clients' officers,[2] directors, supervisors, managers, employees, or agents in their capacity as such or otherwise. Employee acknowledges that Employee's performance of work for Employer's clients is an integral component of Employee's work for Employer and specifically agrees that Employer's clients, as well as the clients' officers, directors, supervisors, managers, employees, and agents are third party beneficiaries of this Agreement. This Agreement also includes any Claims that Employer may have against Employee. The Claims covered by this Agreement include, but are not limited to: (1) claims for breach of any contract or covenant (express or implied); (2) tort claims: (3) claims for wrongful termination (constructive or actual) in violation of public policy; (4) claims for discrimination or harassment, including, but not limited to, harassment or discrimination based on race, color, sex, gender, religion, national origin, alienage or citizenship status, creed, age, marital status, partnership status, military status, predisposing genetic characteristics, medical condition, psychological condition, mental condition, criminal accusations or convictions, disability, sexual orientation, or any other trait or characteristic protected by federal, state, or local law; and (5) claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, including, but not limited to, all claims arising under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Fair Labor Standards Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Employee Retirement Income Security Act, the Equal Pay Act, the Civil Rights Act of 1991, 42 U.S.C. § 1981, the Sarbanes-Oxley Act of 2002, the Worker Adjustment and Retraining Notification Act, the Uniformed Services Employment and Reemployment Rights Act, the Genetic Information Nondiscrimination Act, and claims for wages or other compensation due ("Covered Claims"). The Parties also specifically agree that the Covered Claims include all Claims under the California Labor Code and the California Wage Orders, including, but not limited to, claims for overtime, unpaid wages, and claims involving meal and rest breaks.

The March 29, 2016 Clarification

Based on the parties' stipulation, I find that on March 29, 2016, the Respondent sent a revised arbitration agreement to employees, including the Charging Party, who had not signed an arbitration agreement. This new agreement resembled the previous agreements but also included new language to make

[2] Although the complaint's excerpt of the arbitration agreement uses "officer" at this point, the actual arbitration agreement, in evidence as Joint Exhibit 3, uses the plural, "officers."

clear that it did not bar employees from filing complaints with the Board or other government agencies:

> Complaints to Federal Agencies Not Precluded. Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with a federal agency, such as the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or any equivalent state agency.

Also on March 29, 2016, the Respondent issued a memo to employees who had signed an earlier arbitration agreement. This memo stated that nothing in the arbitration agreement would be interpreted as preventing employees from filing complaints with the National Labor Relations Board.

Based on the parties' stipulation, I also find that, in addition to sending the Charging Party a copy of the revised agreement, it also informed her, by April 5, 2016 email, that if she signed this revised agreement she would be "eligible for deployment to future projects." However, the Charging Party did not sign and, as noted above, the Respondent has not given her a work assignment.

Legal Effects of Arbitration Agreement

Based on the plain language of the arbitration agreement,[3] quoted above, I conclude that the arbitration agreement performed two separate and distinct functions: (1) It established a mechanism for grievance arbitration analogous to the grievance procedures unions and employers commonly negotiate and place in their collective-bargaining agreements. (2) It served as a legal means which the Respondent could use, if sued, to remove the lawsuit from the court and instead submit the issues to an arbitrator for resolution.

As described above, the arbitration agreement required the employee to waive the right to engage in concerted activity, but the nature of the concerted activity associated with the agreement's first function differs from the concerted activity associated with the agreement's second function. One type of concerted activity relates to employee participation in the grievance arbitration procedure which the agreement established for the workplace. The other type of concerted activity relates to the agreement's functioning not in the workplace but in the judicial context.

In the workplace, typical concerted activity could involve two or more employees filing and presenting a joint grievance to an arbitrator. It also might involve one employee filing a grievance not only on her own behalf but also seeking a remedy for her coworkers.

In the judicial context, the concerted activity could involve two or more employees jointly filing a lawsuit in which they were named as plaintiffs. Concerted activity could also involve an employee filing a lawsuit without any co-plaintiffs but seeking a remedy on behalf of other employees as well as herself. A related form of concerted activity would involve an employee filing a lawsuit and seeking to proceed on a class action basis. (As discussed below, to say that such activity is "concerted" does not resolve whether it was also protected by the Act, which the Respondent disputes.) The concerted activity also could involve an employee participating as a class member in a class or collective action lawsuit filed by another employee.

Here, the General Counsel must do more than show that the Respondent required employees to waive the right to engage in activity which was concerted because the Act does not protect all forms of concerted activity. In this case, the government must prove that such concerted activity also was *protected* activity.

A finding that the Act protects a particular kind of concerted activity leads to the conclusion that employees have a statutory right to engage in such activity. And if the Act gives employees the right to engage in this activity, their employer cannot require them to waive that right as a condition of employment. For example, employees have the right to join a union. It is unlawful for an employer to take a job applicant renounce that right as a condition of being hired.[4]

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[3] The complaint uses the singular, "Arbitration Agreement" and I follow that practice here. However, the Respondent issued one agreement to its home office employees on January 20, 2016 and a separate agreement to its project employees on February 17, 2016. Both agreements are titled "Mutual Agreement to Arbitrate Employment Related Disputes," the only difference being that the agreement for project employees includes a hyphen between "Employment" and "Related."

Complaint paragraph 4(a) alleges that the Respondent "has maintained a mandatory arbitration agreement entitled 'Mutual Agreement to Arbitrate Employment Related Disputes' since at least February 17, 2016." The absence of a hyphen between "Employment" and "Related" suggests that complaint paragraph 4(a) was referring to the agreement for home office employees but the February 17, 2016 date suggests that it was referring to the agreement for project employees. However, the modifier "at least" makes it possible that complaint paragraph 4(a) referred to both agreements.

Complaint paragraphs 4(b), 4(c) and 4(d) allege that the Respondent maintained in the arbitration agreement specific quoted clauses since "at least" February 17, 2016. Again, the February 17 date suggests that the complaint is referring to the provisions of the agreement for project employees but the words "at least" open the possibility that the complaint language refers to both agreements.

The language in the two agreements is quite similar and I discern no material differences. Because the complaint used the phrase "at least" to modify February 17, 2016, I conclude that the complaint refers to both the agreement for home office employees and the agreement for project employees.

This decision will follow the complaint's use of the singular form, but with the express understanding that the term "arbitration agreement" refers here to *both* the agreement for home office employees and the agreement for project employees.

[4] See, e.g., *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062 (November 3, 2006) (unlawful to require employees who had engaged in a concerted protest to promise, as a condition of reinstatement, that they would not do it again); *McKesson Drug Co.*, 337 NLRB 935 (2002) (employee had been suspended for filing unfair labor practice charge and it was unlawful to condition his reinstatement on a promise not to file future charges); *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100 (2000) (unlawful to require employees to retract their protected concerted activities or else be discharged); *Bethany Medical Center*, 328 NLRB 1094 (1999) (unlawful to require employee to waive the right to engage in a lawful walkout as a condition of rehire); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995) enf. sub nom *Aroostook*

In the present case, the General Counsel alleges that the Respondent required employees to waive their right to engage in protected activity as a condition of receiving work. The Respondent does not deny that it required the waiver, but defends by stating that the right waived was not one protected by the Act. To analyze the allegation and the defense, I must first determine what activity is at issue and whether the Act gave the employee the right to engage in this activity.

As discussed above, the waiver in the arbitration agreement applies to two different types of concerted activity and it is possible that the Act protects one type but not the other. It is also possible that the Act protects both or neither.

Because the two types of concerted activity are different, I will examine them separately. First, I will consider whether the Act protects the employees' right to file joint grievances or for one employee to file a grievance seeking a remedy for other employees besides herself. Next, I will examine concerted activity in the judicial context.

Do Employees Have A Right to File a Joint Grievance?

a. The Agreement Establishes a Grievance Arbitration Procedure

Before discussing whether the Act gives employees the right to file a joint grievance, I should first explain my conclusion that the arbitration agreement establishes a grievance arbitration procedure. Various terms of the arbitration agreement lead to this conclusion.

At the outset of the agreement, the parties make clear that they are establishing such a comprehensive grievance resolution procedure: "The Parties intend for this Agreement to govern the resolution of all disputes, claims, and other matters in question arising out of or relating to the Parties' employment relationship." Moreover, the "Covered Claims" clause states: "The Parties are *mutually obligated to arbitrate* all Claims arising out of or relating to their employment relationship." (Emphasis added.)

In drafting the arbitration agreement, Respondent defined its scope to include *all* workplace matters. However, most workplace disputes involve issues which, although important to those involved, would never prompt a lawsuit or be considered important enough to justify a lawsuit. If the Respondent had intended the agreement only to be a device to remove lawsuits from court, it could have used narrower language which reflected that intent. Instead, the agreement described the parties' intent in broad terms.

The expansive scope of the arbitration agreement is also manifest in the "Mandatory Arbitration" clause: "The Parties agree [to resolve through arbitration] all grievances, claims, complaints, disputes, or causes of action (collectively, 'Claims') *that relate in any way* to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients. . ." (Emphasis added.) In particular, those words—"that relate in any way"—leave little doubt that the parties intended the scope to be comprehensive and not limited to matters which would warrant litigation in court.

The "Covered Claims" clause of the arbitration agreement also includes language broader than that which would be necessary if the intent were only to remove lawsuits from court. The clause specifically covers "claims for discrimination or harassment, including, but not limited to, harassment or discrimination based on. . ." followed by a long list of possible reasons for such harassment or discrimination. If the sole purpose of the arbitration agreement had been to divert lawsuits, the "Covered Claims" language could have been tailored more narrowly to apply only to those matters for which a cause of action existed.[5]

Most tellingly, the arbitration agreement specifically states that it covers "all grievances." The parties' use of the word "grievances" strongly suggests that they did not intend their agreement to apply only to lawsuits or potential lawsuits in State or Federal court.

In labor relations, the word "grievance" is a term of art which refers to a work-related dispute to be resolved through a contractual procedure, typically a process culminating in binding arbitration. Although terms such as "claim" and "complaint" easily could include pleadings in a lawsuit, a labor lawyer rarely if ever would speak of commencing a lawsuit by filing a "grievance" with the court. Such usage would feel uncomfortably strange on the tongue.

In labor relations, a "grievance" often concerns a workplace issue which, by itself, would not warrant spending the money and time required to file a lawsuit. Some grievances, such as those pertaining to work schedules or assignments, may not have direct monetary consequences at all.

Additionally, the arbitration agreement specifically lists what

County Regional Ophthalmology Center v. NLRB, 81 F.3d 209 (D.C. Cir. 1996); *Retlaw Broadcasting Co., A Subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Channel 47*, 310 NLRB 984 (1993) enf. sub nom *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002 (9th Cir. 1995) (unlawful to condition reinstatement on employee's waiving right to file grievances in the future); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006) (unlawful to condition hire on applicant's willingness to cross picket line); *Penn Tank Lines, Inc.*, 336 NLRB 1066 (2001) (unlawful to condition reinstatement on refraining from union activities); *Pratt Towers, Inc.*, 338 NLRB 61 (2002) (conditioning employment of former strikers on their renouncing or abandoning union constituted unlawful "yellow dog" contract); *Davey Roofing, Inc.*, 341 NLRB 222 (2004) (unlawful to promise a discharged employee that if he removed his name from a union petition a company official would help him get his job back).

[5] For example, the Federal Americans With Disabilities Act defines "disability" to mean, "with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment … " 42 U.S.C. § 12102.

By comparison, the Respondent's arbitration agreement includes, among covered claims, discrimination based on "medical condition, psychological condition, mental condition . . . disability . . . ." Not every medical, psychological or mental condition constitutes a "disability." If the Respondent had intended the terms "medical condition," "psychological condition" and "mental condition" to mean the same thing as "disability," it presumably would not have included the separate term "disability" as well. Thus, the arbitration agreement's broad language indicates that it covers discrimination based on medical and psychological conditions not severe enough to meet the law's definition of "disability."

it does not cover, namely "claims for workers' compensation, unemployment compensation benefits, or any other claims that, as a matter of law, the Parties cannot agree to arbitrate." Presumably, if the parties had not wished to include workplace grievances, they would have listed "grievances" among the matters not covered. Instead, the agreement specifically stated that grievances were covered.

Thus, it is not necessary to go beyond the four corners of the agreement to conclude that it established a procedure for resolving workplace grievances as well as matters which otherwise would result in a lawsuit.[6] The parties therefore did more than agree to sidetrack lawsuits. They established a grievance arbitration mechanism equivalent to those common in labor relations and typically found in collective-bargaining agreements.

Moreover, because of the nature of the Respondent's business, the contractual grievance resolution procedure provides unique benefits to both the Respondent and its employees. The Respondent provides temporary workers to clients who need additional staff for short periods of time. This unusual working environment can complicate the resolution of workplace problems.

For example, the arbitration agreement specifically covers allegations of harassment, including sexual harassment. Addressing and remedying such harassment can be particularly difficult when the harassed employees are temporary employees.

Consider the following hypothetical situation: A "temp agency" like the Respondent sends Employee A and Employee B to a client's business, where they work under the direction of one of the client's supervisors. The supervisor engages in sexual harassment which creates a hostile working environment.[7]

The temporary employee reasonably would feel reluctant to complain to the client's management because the client easily could tell the temp agency to send someone else. However, if the temporary employee complains to her own employer, the temp agency, it places the temp agency's management in a difficult position.

The temp agency's management must decide whether to believe the agency's own employee or to believe the client's supervisor, who denies engaging in harassment. Regardless of the truth of the allegations, the temp agency will not wish to anger the client, and risk losing the client's business, by making accusations against the supervisor. To protect the employee, the temp agency would have to take a stand which might cost it the client's business.

With an arbitration agreement, the temp agency no longer has the unpleasant duty of deciding whether its own employee or its client's supervisor is telling the truth. Indeed, the temp agency does not have to take a position regarding how the client's supervisor acted. If there is any criticism of that supervisor's conduct, such criticism will come from the arbitrator, not the temp agency.

Thus, the establishment of a grievance arbitration procedure benefits the Respondent. The fact that Respondent would derive a benefit from establishing a grievance arbitration procedure lends further support to the finding that the agreement it drafted established such a procedure.

For all these reasons, and particularly based on the plain language of the arbitration agreement, I find that the arbitration agreement creates a mechanism for the routine resolution of workplace issues similar to the grievance arbitration procedures in collective-bargaining agreements.

b. Does the Act protect employees when they file joint grievances or when one employee files a grievance seeking a remedy for other employees?

Section 7 of the Act protects the right of employees to engage in or refrain from engaging in union activities, and also protects their right to "engage in other concerted activities for . . . their mutual aid or protection." 29 U.S.C. § 157. In considering employees' Section 7 rights in the arbitration context, it is appropriate to draw on the Board's experience, which Congress intended the Board to develop and apply in administering the Act. Determining whether activity is concerted and protected within the meaning of Section 7 is a task that "implicates [the Board's] expertise in labor relations." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984).

Over 8 decades, the Board has observed the labor arbitration process extensively, and from several different viewpoints. It often must decide whether unfair labor practice proceedings should be deferred to arbitration.[8] Similarly, it often reviews the awards of arbitrators to determine whether it should defer to an award which an arbitrator already has issued, which involves evaluating to what extent an arbitral award is consistent with or repugnant to the Act.[9] The Board also must consider what weight to accord an arbitral award during an unfair labor practice proceeding. Additionally, the Board examines arbitral awards in cases involving an allegation that a union did not represent a grievant fairly during the arbitral process.[10]

[6] The agreement's language is unambiguous. However, assuming for the sake of analysis that its provisions reasonably could be interpreted in more than one way, common law principles of contract interpretation should apply. The Respondent drafted the arbitration agreement. Moreover, as documented by its email correspondence with Charging Party Adams, the Respondent refused to alter the document even though Adams proposed and requested specific changes. In such circumstances, any ambiguity should be construed against the interest of the drafting party. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

[7] This hypothetical is not unrealistic because, during a relatively short time period, a temporary employee will work at many different businesses and under the direction of many more different supervisors than someone employed permanently at one location. The temporary worker therefore stands a greater chance of encountering the one rotten apple. That would be true statistically even apart from an aggravating factor: The harassing supervisor can create an environment so hostile it drives away permanent employees, creating a recurring need for temporary staff.

[8] See, e.g., *Collyer Insulated Wire*, 192 NLRB 837, 841 (1971).

[9] See, e.g., *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014); *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955).

[10] See, e.g., *Union de Obreros de Cemento Mezclado (Betteroads Asphalt Corp.)*, 336 NLRB 972 (2001).

This experience provides the Board insight into the distinctive nature of arbitration in the workplace and how it relates to federal labor policy and the problems which Congress intended the Act to address. Those objectives include the reduction of industrial strife which burdens and obstructs commerce. Congress described the Act's purposes in Section 1, which includes the following:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151.

Grievance arbitration is not merely *one* of the "practices fundamental to the friendly adjustment of industrial disputes" but one of the most important. This orderly process takes the place of more disruptive means of dispute resolution. Typically, a collective-bargaining agreement which includes a no-strike clause will also provide for binding arbitration, which takes the place of striking to resolve disputes during the contract's term.

Workplace arbitration also reduces divisive differences in wages, hours or working conditions by assuring that all employees receive fair, equal and impartial treatment untainted by bias or favoritism. An important means for reducing such inequalities is the grievance which seeks relief for a number of employees affected by the same work situation. Such a grievance, seeking a remedy for more than one employee, is a key means of making arbitration both efficient and fair.

In workplace arbitration, many grievances typically involve claims by a class of employees rather than by individual employees. For example, if an employer fails to provide its paint shop employees with respirators, it affects all employees in the paint shop, not just one employee whose name appears on the grievance. If a union filed a grievance only on behalf of one complaining employee and sought a respirator for that one worker alone, it would increase rather than reduce inequality. If only the grieving employee received a respirator, leaving the other employees without lung protection, it would heighten workplace tensions which Congress intended to disperse.

The union could, of course, file an individual grievance on behalf of each paint shop employee, but that would multiply the time and expense consumed by arbitration. Additionally, if the individual grievances went before different arbitrators, they potentially might reach conflicting decisions. Thus, instead of being a quick and economical means of dispute resolution, arbitration would become slower and more expensive, and might even increase inequality in the workplace.

In the present case, the Respondent requires employees to "agree that class action and collective action procedures are waived, and shall not be asserted, nor will they apply, in any arbitration …." This prohibition on "collective action" would bar a grievance being filed on behalf of all similarly situated employees and instead would require each employee to file her own grievance.

The Respondent's arbitration agreement goes even further. It states:

> Employee agrees that Employee will not serve as a representative member of any class or collective action, or participate in any class action or collective action claim or procedure instigated by any other person. The Parties also agree that, to the extent permitted by law, *they will be precluded from asserting in arbitration, or any other forum, any representative claims*. [Emphasis added.]

These prohibitions would preclude the type of grievance described above in which a representative grievant seeks a remedy not just for herself but also for fellow workers who are similarly situated. It thus would change workplace arbitration from being an economical and effective means of problem solving into a cumbersome, expensive and ineffectual method.

Consider again the hypothetical situation described earlier: The Respondent sends two of its employees—Employee A and Employee B—to a client's office, where they work under the direction of the client's supervisor. The supervisor engages in sexual harassment which creates a hostile work environment for both employees.

Employee A can file a grievance on her own behalf but, because of the arbitration agreement language quoted above, she cannot seek a remedy for Employee B, who works right beside her in the same hostile environment and is subject to the same abuse. Because of this language, Employee B cannot even participate in the arbitration of Employee A's grievance if Employee A seeks a remedy for Employee B. These restrictions gut workplace arbitration and leave only an impotent shell.

The arbitration agreement prohibits Employee A from helping Employee B by seeking a remedy for Employee B in her grievance. That restriction offends because the Act contemplates that employees will look out for each other, and it assures their right to do so.

In legal terms, when employees look out for each other, when they take steps not only for themselves but for their fellow workers as well, they are acting in concert for their "mutual aid or protection." The right to engage in such concerted activity resides at the very heart of Federal labor policy.

The public may not always appreciate the centrality of this principle—that employees have the right to act together for their mutual aid or protection—because the law also protects the employees' right to form, join or assist labor organizations. Union activities often involve appeals to the public, such as by picketing, and therefore attract more attention. However, these union activities are simply a subset within the broader category of concerted activities which the law protects.

In Section 1 of the Act, Congress set forth its findings and policies. In part, Congress attributed industrial strife to the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract" and large employers. 29 U.S.C. § 151. Congress declared it to be the policy of the United States to eliminate the

causes of "certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by *protecting the exercise by workers of full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (italics added). In Section 7 of the Act, Congress specifically stated that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157.

Thus, Congress expressly recognized and stated that an inequality of bargaining power caused the industrial strife which obstructed commerce. Congress found that the employees could remedy this destructive inequality in power by acting together in their mutual interest. Accordingly, the right of employees to act together provides the very foundation of our national labor policy. In the workplace, an important locus of this concerted activity is the grievance arbitration process. The Congressional concern about inequality of bargaining power is just as pertinent to arbitration as to negotiation.

Notwithstanding that arbitration is a means for the "friendly adjustment" of workplace disputes, it is an adversarial process. As such, it renders justice only when both parties have sufficient resources to prepare and present their cases.

Although an employer typically has more money than any particular employee, an employee grievant depends on the help of other employees who make common cause with him and act together. David does not face Goliath alone when other employees are standing with him.

Forcing employees to waive their right to assist the grievant creates the inequality of power which Congress sought to eliminate. To prevent fellow workers from helping the grievant, or to preclude them from joining in a common grievance for their mutual aid and protection, makes David face Goliath all by himself in a small, dark room.

In determining whether Section 7 gives employees the right to act in concert during the grievance arbitration process, it is helpful to examine how Section 7 protects concerted activities in other contexts. For example, if two or more employees discuss their complaints about working conditions with one of their employer's customers, the Act protects them. *Compuware Corp. v. NLRB*, 134 F.3d 1285 (6th Cir. 1998).

If two or more employees, seeking a change in working conditions, seek the assistance of more influential members of their organization, the Act protects them. *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000) (nurses seeking the assistance of staff physicians).

If two or more employees take their work-related complaint to a supervisor, the Act protects them. *Crowne Plaza Laguardia*, 357 NLRB 1097 (2011).

If two or more employees skip their immediate supervisor and take their complaint about working conditions to officials higher in the chain of command, the Act protects them. *Gabriel Security Corporation*, JD(SF)–104–99 (2000).

If two or more employees take their complaint about working conditions to their employer's board of directors, the Act protects them. *Rhode Island Disability Law Center*, JD–17–02 (2002).

If two or more employees protest working conditions by picketing the employer's stockholders' meeting, the Act protects them. *Engelhard Corp.*, 342 NLRB 46 (2004).

If two or more employees discuss working conditions on Facebook, the Act protects them. *Bettie Page Clothing*, 361 NLRB No. 79 (2014); *Hispanics United of Buffalo, Inc.*, 359 NLRB 368 (2012).

If two or more employees testify on behalf of another employee at a state unemployment compensation hearing, the Act protects them. *Loyalhanna Care Center*, 332 NLRB 933 (2000).

If two or more employees file a complaint alleging wage discrimination with a state's civil rights agency, the Act protects them. *Franklin Iron & Metal Corp.*, 315 NLRB 819 (1994), enf. 83 F.3d 156 (6th Cir. 1996).

If the Act protects employees who seek the support of other employees, if the Act protects employees who present work-related complaints to their supervisor, if the Act protects employees who present such complaints to managers higher in the chain of command, if the Act protects employees who present complaints about working conditions to the employer's board of directors, if the Act protects employees who protest working conditions to the employer's shareholders, if the Act protects employees who discuss their work-related complaints on Facebook, and if the Act protects employees who testify on behalf of another employee at an unemployment compensation hearing, why wouldn't the Act also protect two or more employees who, together, take their work-related complaint to an arbitrator? The Respondent has not offered any persuasive reason why the Act would make an exception for concerted activity related to grievance arbitration, and I can think of none.

The Board's caselaw has revealed, over a period of 8 decades, that at least a few employers do not want their employees to be empowered by acting in concert. These cases show that such employers have resorted to various divide-and-conquer tactics to make each employee an island. One such tactic involves forcing employees to sign, as a condition of employment, individual agreements purporting to waive their right to act together in the manner Congress contemplated.

Here, the Respondent has forced its employees to sign an agreement which ostensibly provides for arbitration but does so in a way which isolates employees from each other. Rather than allowing arbitration to perform its customary function in the workplace—providing a forum where employees and employer stand on an equal basis before the neutral decision-maker—the arbitration agreement makes the employee go it alone.

Requiring employees to waive the right to engage in concerted activity through the grievance arbitration process resurrects the inequality of power which existed before the Act's passage. In other words, the agreement targets a right which has been protected by law for more than 8 decades. The elaborate legal language hides this purpose no better than lipstick can disguise a yellow dog.

In sum I conclude that Section 7 of the Act protects employees' right to file and pursue a joint grievance through the grievance arbitration process. Likewise, I conclude that Section 7

protects an employee's right to file a grievance which seeks a remedy for other employees, and an employee's right to assist another employee in the preparation and presentation of a grievance, to testify on the other employee's behalf, to represent the other employee at the arbitration, and otherwise to participate in the arbitration.

It may be noted that in reaching these conclusions, I need not and do not rely on the *D. R. Horton* line of precedent discussed below. Instead, I base that conclusion on the Board's decisions cited above.

Section 7 and Lawsuits

The arbitration agreement which the Respondent required employees to sign does more than establish a workplace arbitration process. It provides a legal tool which the Respondent can use if sued by an employee. In that event, the Respondent can invoke the arbitration agreement and seek a court order diverting the matter to arbitration, thereby denying the plaintiff a trial before judge and jury. In seeking such a court order, the Respondent would cite and rely upon the Federal Arbitration Act.[11]

For clarity, it is important to stress that the Respondent's arbitration agreement includes two different lawsuit waivers but only one of them is at issue here. The arbitration agreement requires an employee to give up the right to file any kind of lawsuit solely on her own behalf, and it also requires her to waive the right to file or participate in a class action or collective action lawsuit.

Requiring the first kind of waiver—of the employee's right to file a lawsuit only on her own behalf—is lawful. No one here disputes that an employer can condition employment on a worker's signing a waiver of the right to file a lawsuit on her own behalf. Accordingly, the government does not allege this individual waiver to be a violation.

One employee filing such a lawsuit by herself and seeking relief for herself alone is engaging only in individual activity which the Act does not protect. However, according to the General Counsel, when two or more employees file a lawsuit together, they are engaged in concerted activity for their mutual aid or protection and therefore enjoy the Act's protection. Likewise, the government argues, an employee who files a class action on behalf of other employees is engaged in protected concerted activity.

The General Counsel contends that the Respondent violated the Act by denying employees any forum in which they could act in concert in bringing their work-related claims before a decision-maker. The Respondent forces grieving employees to go it alone and that, the General Counsel asserts, violates the Act.

The government grounds this argument in a line of Board decisions which begins with *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013). The General Counsel's brief states:

> In *D.R. Horton*, 357 NLRB at 2277, the Board found that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and many other cases, the Board noted that such concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. Most recently, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1–2 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), the Board adopted and reaffirmed the rationale and decision in *D.R. Horton*. The *Murphy Oil* Board found that the respondent violated Section 8(a)(1) of the Act by requiring its employees to sign mandatory arbitration agreements obligating them to resolve all employment-related disputes through individual arbitration.

The Respondent's brief, in contrast, noting that the United States Court of Appeals for Fifth Circuit denied enforcement in both the *D. R. Horton* and *Murphy Oil* cases, argues that the Board should rethink and reject the reasoning in those cases:

> Section 7 does not import procedures from other statutes or rules and convert them into substantive rights. Furthermore, the Federal Arbitration Act requires that arbitration agreements like the Project Employee Agreement be enforced according to their terms. Based on this overwhelming rejection, it is time to repudiate *D.R. Horton I* and to recognize that employers may include class and collective-action waivers in mandatory arbitration agreements without violating the Act.

However, the Respondent's argument essentially creates a "straw man" and then knocks it over. It rests on the assumption that the General Counsel is claiming that Section 7 creates a right for employees to avail themselves of the class action provisions in the Federal Rules of Civil Procedure (or similar rules in other courts) or of the collective-action procedures provided in the Fair Labor Standards Act. However, I do not understand the General Counsel to be making such an argument.

Although the General Counsel's brief does allude to "class action" lawsuits, the underlying principle does not involve an employee's "right" to invoke the court rules allowing class actions. The cases cited by the General Counsel leave no doubt that the government rests its argument on a bedrock principle established in the earliest days of the Act: Two or more employees have the right, when acting together, to file a lawsuit against their employer over an issue concerning terms and conditions of employment.

[11] Section 3 of the Federal Arbitration Act states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

The General Counsel thus cites *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942). In that case, three employees had engaged in union activity but also had acted together to file a wage lawsuit against their employer. The Board found that the employer unlawfully had discharged the three because of their union activities. However, the employer argued that it really had fired them not because of union activity but because they had filed the lawsuit. The Board replied that even if "the discharges were, as claimed by the respondent, the immediate result of this [legal] action by the employees, we are of the opinion and find that the joining of the three union members in the suit constituted concerted activity protected by the Act and that their discharge, for this reason, was violative of the Act." 42 NLRB at 949.

More recent cases follow this principle. In *Leviton Manufacturing Co.*, 203 NLRB 309 (1973), an employer discharged employees who had filed a lawsuit against it. The employees had been candidates for union office and the lawsuit alleged that the employer unlawfully had interfered in this internal union election and also alleged that the employer had interfered with employee rights under the contractual grievance procedure. The Board, reversing the administrative law judge, found that the employer violated the Act by discharging them. "We must conclude," the Board wrote, "that the Respondent discharged the four employees for filing the above-described civil suit. This activity is protected under the Act unless this activity was done with malice or in bad faith. In our view, the evidence clearly failed to establish any malicious or bad-faith intent. Accordingly, such discharges constituted interference, restraint and coercion with respect to Section 7 rights and thus violated Section 8(a)(1)." *Leviton Manufacturing Co.,* 203 NLRB at 311 (citations omitted).

The Board reached a similar conclusion in *Trinity Trucking & Materials Corp.*, 227 NLRB 792 (1977), a case of particular relevance here. Employees had sued their employer, and their employer's client, over wages. The employees' lawsuit included a claim for punitive damages and some rather strong negative language describing the employer's alleged conduct. In a letter, the employer gave them 48 hours to withdraw the allegations that the defendants had acted "with intentional, malicious, oppressive, and heedless disregard of the rights of the plaintiff" and the prayer for punitive damages.

The Board, adopting the judge's decision, found that the lawsuit constituted protected concerted activity under the Act and that the employer had not met its burden of showing that the employees had acted with malice or in bad faith when they filed the lawsuit. Accordingly, the Board found that the employer had violated Section 8(a)(1) of the Act both by threatening to discharge the employees if they did not withdraw parts of the lawsuit, and by discharging them when they refused.

The *Trinity Trucking* case has particular relevance here. Under the Respondent's arbitration agreement, employees must waive both the right to sue the Respondent and the right to sue the Respondent's clients. However, in *Trinity Trucking,* the Board found that the employees' lawsuit against both their employer and the employer's client constituted concerted activity protected by Section 7.

In *Host International*, 290 NLRB 442 (1988), the Board found that the employer unlawfully had "refused to hire [applicants] Rizzo and Sarubbi in 1985, not because they had previously been terminated for cause, but rather because of Rizzo's protected concerted activity in filing a lawsuit against the Respondent in 1981 with other employees and because Rizzo and Sarubbi had filed charges with the Board. . ." 290 NLRB at 442–443. See also *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000); *Le Madri Restaurant*, 331 NLRB 269 (2000).

Thus, over decades, the Board consistently has held that Section 7 grants employees the right, acting in concert, to file a lawsuit concerning their terms and conditions of employment. This principle is not some novel innovation but well-established law.

The crucial ingredient here is that employees are acting in concert for their mutual aid or protection. A solitary employee, filing a lawsuit only for her own personal benefit, does not engage in such protected activity. But when two or more employees act together in filing a lawsuit concerning terms or conditions of employment, that action enjoys the protection of the Act unless done in malice or bad faith.

Moreover, when a solitary employee takes some action which is not just for herself but on behalf of other employees as well, that action does constitute protected concerted activity. It is just as much protected concerted activity as when two employees act ensemble. Moreover, Section 7 protects the right of one employee to act on behalf of other employees even if they have not given her prior permission to do so. See, e.g., *Salisbury Hotel*, 283 NLRB 685 (1987). See also *Citizens Investment Service Corp. v. NLRB*, 430 F.3d 1195 (D.C. Cir. 2005), citing *Meyers Industries, Inc.*, 281 NLRB 882 (1986), aff'd sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

In the present case, the parties' briefs largely focus on this second form of protected concerted activity, in which one employee takes action on behalf of other employees. The extensive line of cases cited above clearly establishes that Section 7 gives two or more employees, acting together, the right to sue their employer over a work-related matter. They have the right to walk into the court clerk's office, file a pleading listing their names as plaintiffs, and proceed with the lawsuit. Because Section 7 grants them this right to act in concert, an employer cannot lawfully require them to waive it. But the question being debated in the briefs is whether the law protects one employee when she files a lawsuit on behalf of other employees as well as herself.

Section 7 certainly protects her right to take many other types of action on behalf of coworkers, actions such as filing a grievance, or speaking out in public about working conditions, or protesting to management about working conditions. So long as she is doing so on behalf of other employees and not just herself, the Act protects her. Then, why wouldn't the law protect her right to file a lawsuit seeking relief for other workers as well as herself?

As I understand Respondent's argument, it answers by saying, "that would be a 'class action,' and Section 7 does not give employees the right to file a class action." However, such an argument is wildly off the mark.

A plaintiff can seek a remedy for someone other than herself

without having to invoke Rule 23 of the Federal Rules of Civil Procedure or some analogous class action rule under state law. A plaintiff certainly can ask for and pursue a remedy for other employees without seeking to certify a class. Indeed, in most instances, an employer will not have enough employees to meet the numerosity requirements of Rule 23.

Significantly, the Respondent's arbitration agreement does not merely force an employee to waive the right to file a class action (under Rule 23 or otherwise) but much more broadly requires the employee to relinquish the right to file any "representative claim" for other workers. The Respondent's attempt to prevent one employee from representing another goes to the very core of the rights protected by Section 7 of the Act, the right of employees to look out for each other, to act in concert for their mutual aid or protection.

The Respondent's arbitration agreement forces employees to give up much more than a right to use Rule 23 procedures. Rather, it cuts to the quick. Nonetheless, the Respondent tries to make a tangential, irrelevant matter central by claiming that the issue concerns a supposed "right" to invoke a court's class action procedures. Thus, the Respondent's brief states:

> When the Board decided that § 7 protects the right to bring or participate in class or collective actions, it analogized those "rights" to the right to bring good faith, non-malicious lawsuits or administrative complaints. See *D.R. Horton I*, 357 N.L.R.B. at 2278 & n.4. The appropriate analysis, however, is whether the Act protects the ability to access class-action and collective-action procedures. Those procedures are governed by specific statutory provisions or procedural rules that exist outside the Act. See 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(b); Fed. R. Civ. P. 23 (class actions). Federal courts, including the Supreme Court, have made clear that there is no substantive right to access those procedures; any such right is procedural only. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).

The Respondent blows a smokescreen of confusion across the field of analysis. Framing the issue as "whether the Act protects the [employees'] ability to access class-action and collective-action procedures" totally misapprehends the nature of Section 7 of the Act.[12] Section 7 does not create or "protect" a right of access to class action or collective-action procedures. Whether any employee is entitled to bring a collective-action lawsuit is for the *court* to decide in accordance with its rules and applicable law.

It should be stressed that in deciding whether or not a lawsuit may proceed under the class action rules, the court examines the specific facts of the individual case before it, and considers whether these facts satisfy the requirements of the court rule. As the facts differ, case by case, the court will reach different conclusions. In some cases it will decide that the case does not qualify for class action status, and in other cases it will decide that the case does qualify. However, in making such decisions, the court will not be looking at Section 7 of the Act because it is irrelevant.

An employee's Section 7 rights do not provide a rubber stamp to mark "Approved for Class Action" on the pleadings. However, since Section 7 does protect the right of two or more employees to sue their employer concerning working conditions, and likewise protects the right of one employee to sue if seeking a remedy for other employees besides herself, it certainly would protect the right to take any of the ordinary steps involved in a lawsuit, such as engaging in discovery or seeking class certification. A court certainly may reply, "sorry, but you don't meet the standards," but nonetheless, if the employees' complaint relates to terms and conditions of employment, Section 7 protects their right to ask.[13]

Also, consider this hypothetical situation. As the cases cited above clearly establish, two or more employees most assuredly have the Section 7 right to sue their employer concerning conditions of employment, provided they are not acting with malice or in bad faith. Their employer lawfully cannot force them to waive this right. Therefore, in this hypothetical, they are present in the courtroom and enjoying the full protection of the Act. In concert, they decide to amend their lawsuit and seek

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[12] It both puzzles and concerns me that the Respondent, having read the Board's *D. R. Horton* decision, would then argue that the "appropriate analysis … is whether the Act protects the ability to access class-action and collective-action procedures." In the *D. R. Horton* decision itself, the Board clearly and unequivocally stated that the Act did *not* confer an ability or entitlement to use such procedures.

Here, I do not wish to suggest either that the Respondent failed to understand the plain meaning of the Board's words or that it deliberately ignored that meaning. Excluding those two possibilities, I must assume that the Respondent wished somehow to challenge the Board's description of its own holding.

A party certainly may argue that one of the Board's precedents does not say what it really means or that it doesn't really mean what it says. In the interest of clarity, however, a party embarking on such an argument should proceed very methodically, explaining all premises and logical steps. Otherwise, the argument is more likely to confuse than persuade.

That may be the case here. The Respondent certainly seems to assume a premise contrary to fact, namely, that the Board's *D. R. Horton* decision rests on some conclusion that Section 7 creates an entitlement to use class action procedures, but that is a conclusion which the decision expressly denies.

Such an argument necessarily would imply that the Board did not, in *D. R. Horton*, mean what it said, but such an unusual premise needs to be disclosed and justified, and cannot simply be assumed. Indeed, the law must assume the opposite, that precedents ordinarily mean what they state, because otherwise they provide no guidance.

Therefore, if the Respondent wishes to characterize the *D. R. Horton* line of precedents as creating some Section 7 right to file a class action lawsuit, it should address the following language which is directly to the contrary: "Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." *D. R. Horton, Inc.*, 357 NLRB 2277, 2286 fn. 24 (2012).

[13] *See California Commerce Club*, 364 NLRB No. 31, slip op. at 1, fn. 2 (June 16, 2016) ("the Act does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint"), citing *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (October 28, 2014).

class certification. Is this concerted action, seeking class certification, somehow less protected by Section 7 than the concerted activity of filing the lawsuit in the first place?

It would be absurd to hold that, although an employer lawfully cannot force employees to give up their concerted right to file a lawsuit about working conditions, it could indeed lawfully require them to give up the right to engage in discovery, or to subpoena witnesses, or to move for sanctions or to take any other actions permitted under the applicable rules of procedure. If an employer could require employees to waive the right to do the customary and necessary things required in a lawsuit, then their right concertedly to file a lawsuit becomes illusory, a hollow shell.

Respondent's brief characterizes the "right" to bring class actions as "procedural" rather than "substantive" but this very characterization undercuts its argument. The substantive right, the one which Section 7 protects, is the right of employees, acting in concert, to sue their employer about terms and conditions of employment. That right also includes the right of one employee to bring such a lawsuit on behalf of other employees because that, too, constitutes protected, concerted activity. The Respondent cannot lawfully require their waiver.

Section 7 doesn't give such plaintiffs an entitlement to use class action procedures, but it does protect their right to take the actions allowed under the court's rules because the court's rules are available to and binding on every party to a lawsuit. An employer lawfully cannot gut the employees' concerted right to file a lawsuit by making them give up the right to use the court's procedures. An employer who required such a waiver not only would geld the employees' Section 7 right to sue but also would interfere with the court's authority to manage its own cases.

Moreover, and notwithstanding the arguments in the Respondent's brief, the real issue here does not concern class action procedures but the fundamental Section 7 rights of employees to assert a work-related claim on behalf of other employees, the right of one worker to seek a remedy for other employees besides herself. Although the Respondent's arguments focus on class actions, particularly under Rule 23 of the Federal Rules of Civil Procedure, the Respondent's arbitration agreement forces employees to waive their rights in other contexts as well.

Significantly, the Respondent's arbitration agreement provides an alternative to arbitration. The arbitration agreement expressly provides that an employee may bring a claim for less than $10,000 in small claims court.

Potentially, many claims will be decided by the small claims court rather than an arbitrator. However, the arbitration agreement *still* prohibits two or more employees from filing suit together or for one employee to file a suit on behalf of any employer besides herself. It states that "the Parties agree that class action and *collective action* procedures are waived, and shall not be asserted, nor will they apply, in any arbitration (or dispute adjudicated *in any other forum*) pursuant to this Agreement." (Emphasis added.)

For the reasons stated above, I have concluded that an employee reasonably would understand the term "collective action" to apply not merely to lawsuits under the Fair Labor Standards Act but to any lawsuit brought by more than one employee or by one employee on behalf of other employees. Therefore, an employee reasonably would understand the arbitration agreement to prohibit two or more employees filing a lawsuit together in small claims court. Similarly, an employee reasonably would understand the prohibition to include one employee filing a lawsuit on behalf of other employees. That conclusion becomes inescapable because the arbitration agreement also precludes "representative claims." Thus, the arbitration agreement unlawfully requires employees to waive the right to engage in concerted activities protected by Section 7 of the Act.

The Respondent's arguments about Federal law hardly are convincing when the litigation is in a State small claims court. However, I return to them now because they have the potential for misdirection but the prestidigitation is not always obvious. The Respondent's brief cites *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) for the proposition that there is "no right to class procedures" under the Age Discrimination in Employment Act "despite the statute explicitly providing for class procedures." Additionally, the Respondent cites *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) for the proposition that Rule 23 of the Federal Rules of Civil Procedure does not "establish an entitlement to class proceedings for the vindication of statutory rights."

However, as stated above, this case does not present the question of whether Respondent's employees are entitled or are not entitled to file a class action lawsuit. Rather, the question is whether the Respondent lawfully can force them[14] to waive their right to file any lawsuit at all, even one in which two or more employees act in concert to file the lawsuit, and even one in which one employee files a lawsuit seeking a remedy for other workers. I conclude that the Respondent lawfully may not require either waiver.

Additionally, it is important to stress the nature of the harm caused. Requiring an employee to give up a Section 7 right does not merely inflict a harm "down the road" at some future date when the employee may have a need to exercise the right. Rather, the harm occurs immediately, and it occurs whether or not the employee ever actually would exercise that right. Indeed, forcing an employee to waive even a reasonably possible Section 7 right violates the Act.

In that regard, this case bears some resemblance to the situation in which an individual applies for a job as a delivery truck driver and the employer states that the applicant will not be hired unless he first agrees that, in making deliveries, he will cross a picket line. Section 7 gives an employee the right to honor a picket line which a union has established at another

[14] The complaint alleges unlawful interference, restraint and coercion, in other words "arm twisting" by the Respondent to force employees to give up rights the Act protects. If the Respondent had sent muscular, raw-boned "negotiators" to secure an employee's signature through the manual application of torque to her extremities, that coercion clearly would violate Section 8(a)(1). Figurative arm-twisting - by making it clear to the employee that she would not work unless she signed the waiver - constitutes coercion every bit as unlawful, even if lacking in chiropractic drama.

business, so the employer here is asking the applicant to waive that right as a condition of being hired.

The employer does not know whether this driver will ever encounter such a picket line and has no way to foresee the future, but he doesn't want to take any chances. However, even though it is unlikely that the driver will ever have occasion to assert the right to honor a picket line, the employer nonetheless violates the Act when it requires him to waive that right as a condition of being hired. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1320 fn. 8.

Likewise, in the present case it is speculative, and highly dependent upon facts not yet knowable, whether a court would ever allow the employees to file or participate in a class action lawsuit. However, if a court someday should permit them to do so, that activity would be concerted and for the employees' mutual aid or protection, and therefore protected by Section 7.

Just as an employer cannot require an employee to waive the right to honor a picket line (on the off chance that the employee might someday encounter such a picket line), an employer cannot require employees to waive the right to participate in a lawsuit, even a lawsuit proceeding under the court's class action rules (on the off chance that someday a court would allow them to do so).

The Act makes it unlawful for an employer to require an employee to waive a statutory right even if the employer doesn't know whether the employee ever will have occasion to exercise that right. A casual observer might believe it odd, even silly, for the Board to find that the employer had "interfered with, restrained or coerced" an employee in the exercise of Section 7 rights when the employee might never have an opportunity to exercise it. However, this misconceives the nature of the harm.

The harm does not occur at some distant point in the future when the employee wishes to exercise the right but finds he cannot. Rather, the harm occurs at the moment the employer makes the unlawful demand that the employee waive the right as a condition of working. The offense is to the inviolate nature of the right itself. The offense is to the employee's right to have rights. The offense is to the employee's freedom to make an uncoerced choice about waiving or refusing to waive a Section 7 right.

The Board has responsibility for protecting employees' Section 7 rights, including their right to make free and uncoerced choices about the exercise of those rights. To do so, it must prevent an employer from demanding that an employee waive a right even if its exercise is an unlikely possibility far in the future. The reason for this strictness is simple: If an employer is free to require the relinquishment of a statutory right, and free to punish the employee's refusal with discharge or other penalty, then no Section 7 right is ever safe.

Additionally, the harm caused by this coercion is not limited to the employee coerced but extends to other employees as well. Allowing an employer to disable a statutory right, even one which very likely will never be used, devalues all rights because it makes them appear to exist only at the pleasure of the employer. Creating the impression among employees that Section 7 rights are ephemeral and may be extinguished by the employer unilaterally itself chills employees' willingness to exercise them.

It may be noted that complaint paragraph 4(e), discussed below, describes the violation as forcing employees to sign an agreement which they "would reasonably conclude" precludes them from engaging in activity protected by the Act. Part of the alleged harm is the chilling effect on employees' exercise of Section 7 rights. That harm occurs the instant the employer presents an employee with the Hobson's choice of refusing to waive a right which the employee reasonably would believe she possesses or else continue to work.

Stated another way, even if there is some legal uncertainty about whether the right exists or under what circumstances it could be exercised, if there is an objectively reasonable belief that the right exists, then the employer's demand for a waiver puts the employee under significant coercive pressure. This pressure has an effect on the composition of the employer's workforce. It weeds out those employees who value their Section 7 rights enough to stand up for them, and thereby subject themselves to possible discharge, while keeping more docile employees. Forcing employees to sign the waiver or else leave results in an employee complement less willing to engage in concerted activities such as form a union.

Forcing an employee to sign a document which reasonably may be understood to waive Section 7 rights can be compared to requiring the employee to play Russian roulette—*just pull the trigger this once*—as a condition of continued employment, and discharging the assertive employee who refuses. It doesn't matter if doing so actually results in the employee losing a right which he someday will need to use. Even if the chamber is empty, making him pull the trigger causes the harm.

A very present and immediate harm, not a future and speculative harm, lies in the employer's threat to take adverse action against the employee if she refuses to yield that which she is entitled to keep, her rights under Section 7 of the Act. Refusing to give up a Section 7 right—or even refusing to give up what the employee reasonably would believe to be a Section 7 right—is *itself* a Section 7 right.

In sum, I find that the Respondent's arbitration agreement required the waiver of rights protected by Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.[15] It is not nec-

[15] The Supreme Court has recognized that the employees' Section 7 right to act together for their mutual aid or protection extends to concerted activity in judicial and administrative forums. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Because employees may not always be aware of the distinction between individual and concerted activities, and to assure that employees do not reasonably but mistakenly believe that they must waive their right to engage in concerted activity in a judicial forum, I recommend that the Board consider adopting a bright line rule.

Absent a specific statement about concerted activity, language purporting to waive an employee's right to file a lawsuit almost certainly would lead the employee to believe that she thereby was waiving not merely individual but concerted rights, including the right to be named as a co-plaintiff in a lawsuit filed by two or more employees for their mutual aid or protection. Likewise, absent a specific statement, language waiving an employee's right to sue on her own behalf alone also reasonably would create the impression that the employee was waiving her right to bring a lawsuit on behalf of other employees as well as herself. Therefore, I recommend that the Board adopt a bright line principle that an employer will violate Section 8(a)(1) if it requires an

essary to rely on the *D. R. Horton* precedents to reach this conclusion and I do so based on the other cases cited above. However, the conclusion is fully consistent with *D. R. Horton* and its progeny.

Complaint Paragraph 4(e)

Complaint paragraph 4(e) alleges that at all material times, employees would reasonably conclude that the provisions of the Arbitration Agreement quoted in the complaint would preclude employees from engaging in conduct protected by Section 7 of the Act. Respondent has denied this allegation.

The "Waiver of Class Action and Representative Action Claims" clause, set forth in complaint paragraph 4(c), requires an employee to agree "that class action and collective action procedures are waived, and shall not be asserted, nor will they apply, in any arbitration (or dispute adjudicated in any other forum) pursuant to this Agreement."

It might be argued that an employee who was not a labor lawyer would not see the connection between class and collective actions and protected concerted activity. However, those quoted words do not exist in isolation. This immediately follows:

> Employee agrees that Employee will not serve as a representative member of any class or collective action, or participate in any class action or collective action claim or procedure instigated by any other person. The Parties also agree that, to the extent permitted by law, they will be precluded from asserting in arbitration, or any other forum, any representative claims.

An employee reading this text would reasonably, and almost certainly, believe that the words meant she could not file a grievance on behalf of anyone but herself. She also would reasonably understand that she could not participate in a grievance filed by any other employee.

Reading the last sentence, the employee reasonably would conclude that she could not assert "in arbitration, or any other forum, any representative claims." Those words plainly would preclude her from filing a grievance on behalf of anyone other than herself.

These restrictions, forbidding any "representative claim," render the agreement's grievance arbitration procedure cumbersome and inefficient because, in the workplace, a condition which affects one employee likely affects others as well.[16] Clearly, an employee would reasonably understand these provisions as depriving her of the rights which employees commonly enjoy and exercise during the grievance process, rights protected by Section 7 of the Act.

The words clearly effect a waiver of the employee's right to act in concert with other employees for their mutual aid or protection and, I conclude, an employee reasonably would understand them to constitute a waiver of Section 7 rights.

Complaint Paragraph 4(f)

Complaint paragraph 4(f), which Respondent denies, alleges that from February 17, 2016, until March 29, 2016, employees reasonably would have concluded that the provisions of the Arbitration Agreement, as described above in paragraphs 4(a) and 4(d), preclude employees from filing unfair labor practice charges with the Board.

The General Counsel's brief concedes that the arbitration agreement "did not explicitly restrict employees' right to file unfair labor practice charges with the Board" but argues that "the Agreement contains broad language regarding its scope and applicability such that employees would reasonably construe it to prohibit the filing of charges with the Board." Therefore, I will begin this analysis by examining the provisions in the arbitration agreement. The agreement's first clause, "Intent," provides in part:

> The Parties shall resolve all disputes, claims, and other matters in question arising out of the employment relationship in accordance with the provisions of this agreement.

The arbitration agreement's next clause, "Mandatory Arbitration," includes the following:

> The Parties agree that all grievances, claims, complaints, disputes, or causes of action (collectively, 'Claims') that relate in any way to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients, whether based in contract, tort, fraud, misrepresentation state *or federal statutory law*, or any other legal theory, shall be submitted to binding arbitration administered by the American Arbitration Association….

The "Covered Claims" clause of the arbitration agreement

employee to waive her individual right to bring a lawsuit about terms and conditions of employment, unless the waiver language specifically informs the employee that she is not giving up the right to act in concert with other employees filing a lawsuit for their mutual aid or protection, and that she is not giving up the right to file a lawsuit which seeks a remedy for other employees as well as herself.

[16] Indeed, the great harm which these limitations inflict on workplace arbitration demonstrates the vast difference between labor arbitration and commercial arbitration. The Respondent's brief did not recognize this difference when it cited the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) for the proposition that class actions were not appropriate in arbitration. The Respondent's brief quoted the Supreme Court's statement that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the [Federal Arbitration Act]." [563 U.S.] at 344."

The Respondent then quoted the Court's observation that "[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."

Clearly, the Court was describing commercial arbitration rather than workplace arbitration, which does not serve an immense group of people who don't know each other but employees who work together and typically share a community of interest. As an institution of this community, workplace arbitration performs not only a dispute resolution function but also a conflict reducing function. It provides a means to assure that all employees are treated fairly and equally.

Thus, a grievance filed on behalf of all affected employees not only resolves the issue efficiently but also assures that all such employees receive the same remedy.

specifies which types of work-related complaints must be addressed through arbitration. The following language is particularly relevant:

> **Covered Claims**. The Parties are mutually obligated to arbitrate all Claims arising out of or relating to their employment relationship. This Agreement covers *all Claims in a federal*, state, or local court or *agency under applicable federal*, state, or local *laws*, arising out of or relating to Employee's employment with Employer, performance of work for the Employer's clients, or the termination of Employee's employment….The Claims covered by this Agreement include, but are not limited to … (3) claims for wrongful termination (constructive or actual) in violation of public policy; (4) claims for discrimination or harassment … (5) *claims for violation of any federal*, state, or other governmental *law*, statute, regulation, or ordinance…. [Emphasis added.]

On their face, these provisions clearly encompass filing an unfair labor practice charge with the Board. Such a charge alleges a violation of Federal law and the Board is a Federal agency. An unfair labor practice charge also concerns matters "arising out of or relating to" the charging party's employment. It is difficult to imagine an interpretation of this language that somehow would exclude filing a charge with the Board. Therefore, I conclude that an employee reasonably would believe that the agreement covered unfair labor practice charges.

Further, I conclude that an employee reasonably would believe that arbitration was the exclusive means of resolving claims. The agreement's use of phrases such as "shall resolve," "shall be submitted" and "mutually obligated to arbitrate all Claims" clearly convey that the employee must use the arbitral forum. So does the heading "Mandatory Arbitration."

Additionally, I conclude that an employee reading the agreement would believe not only that if he wished to complain about conditions of employment he had to use arbitration, but also that he could only use arbitration. The requirement that the employee "shall resolve" the claim through arbitration clearly implies that he may not resolve it through another means, such as by filing an unfair labor practice charge with the Board.

The prohibition appears in an arbitration agreement rather than in the form of a work rule. However, the employee must sign and be bound by the agreement as a condition of working. Therefore, the restriction resembles a work rule because it is imposed rather than assumed voluntarily. Accordingly, I will follow the Board's framework for determining the lawfulness of a work rule, set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Under *Lutheran Heritage*, the inquiry begins with whether the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The provisions in question do not explicitly prohibit recourse to the Board. However, for the reasons stated above, I have concluded that they do prohibit an activity which the Act protects, filing charges with the Board. Therefore, I further conclude that requiring employees to sign the agreement interferes with their exercise of protected rights and thereby violates Section 8(a)(1) of the Act. *Supply Technologies, LLC*, 359 NLRB No. 38 (2012).

On March 29, 2016, the Respondent notified employees that the arbitration agreement had been revised and that the following language had been added:

> Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with a federal agency, such as the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or any equivalent state agency.

Complaint paragraph 4(f) does not allege that this violation continued beyond March 26, 2016 and I conclude that it did not. However, I do conclude that the Respondent violated Section 8(a)(1) of the Act during the time period February 17, 2016 through March 29, 2016, as alleged in complaint paragraph 6 and that this unfair labor practice affected commerce, within the meaning of Section 2(6) and (7) of the Act, as alleged in complaint paragraph 7.

Complaint Paragraphs 5(a), 5(b) and 5(c)

Complaint paragraph 5(a) alleges that on about February 26, 2016, the Respondent required that employees sign the Arbitration Agreement or, if they did not sign, employees would be released from their project assignments. Based on the parties' stipulation,[17] I so find.

Complaint paragraph 5(b) alleges that by this conduct, the Respondent caused the termination of employee Kimani Adams. The parties stipulated that between February 22 and February 26, 2016, Charging Party Adams exchanged email messages with Respondent regarding the arbitration agreement and her employment status. The parties further stipulated that on February 24, 2016 Respondent released Adams from her project assignment as a result of her failure and refusal to sign the arbitration agreement, and that since that date the Respondent has not assigned her to a new project, has not assigned her any work hours, or paid her any wages other than those she earned prior to February 24.

Additionally, the parties stipulated that, as of June 13, 2016, Adams had not executed the arbitration agreement and that the Respondent had not deployed her to any projects since February 24, 2016.

The parties have stipulated, as set forth above, both that the Respondent removed Adams from her work assigned on Febru-

[17] The parties stipulated as follows: On February 17, 2016, Respondent electronically disbursed a copy of a Mutual Agreement to Arbitrate Employment-Related Disputes (Arbitration Agreement) to its project employees, which included the Charging Party. Respondent required its project employees, including the Charging Party, to execute the Arbitration Agreement in order to remain eligible to work project assignments.

ary 24, 2016 and that it has not assigned her any more work since that date. From the stipulation, I also find that the Respondent took these actions because Adams refused to sign the arbitration agreement.

Additionally, for the reasons stated above, I have concluded that the arbitration agreement effected a waiver of the signer's right to engage in concerted activities protected by Section 7 of the Act. Therefore, I conclude that Adams was engaging in protected concerted activity when she refused to sign the document.

Further, based on the stipulation, I find that the Respondent removed Adams from her work assignment and refused to assign her further work because she engaged in the protected activity of refusing to sign the waiver.

The Board has held that a significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity, will establish constructive discharge. *Alpine Log Homes, Inc.*, 335 NLRB 885 (2001), citing *Consec Security*, 325 NLRB 453 (1998), and cases cited therein, enfd. mem. 185 F.3d 862 (3d Cir. 1999).

Accordingly, I conclude that the Respondent caused Adams' employment to be terminated as of February 24, 2016, as alleged in complaint paragraph 5(b). Further, I find that the Respondent took this action because Adams had engaged in protected concerted activities, and to discourage other employees from engaging in such activities, as alleged in complaint paragraph 5(c).

Additionally, I conclude that this action violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6, and that this unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act, as alleged in complaint paragraph 7.

REMEDY

Having found that the Respondent violated the Act, I turn now to the appropriate remedy. The Respondent must post the notice to employees which is attached to this decision as Attachment A, and comply with the other posting requirements set forth in the order below.

The Respondent's project employees work at the offices of the Respondent's clients and therefore might not see the notice to employees posted at the Respondent's place of business. However, the complaint does not allege that these clients are joint employers and they are not parties to this proceeding. Therefore, it would not be appropriate to order them also to post the notice.

Instead, I recommend that the Board order the Respondent to send signed copies of the notice to each client at which the Respondent's employees perform work and request that the client post the notice. In making this recommendation, I note that the arbitration agreement itself stated that it "shall also apply to all claims by Employee against Employer's clients as well as the clients' officers, directors, supervisors, managers, employees, and agents."

The arbitration agreement also stated that the employee "acknowledges that Employee's performance of work for Employer's clients is an integral component of Employee's work for Employer and specifically agrees that Employer's clients, as well as the client's officers, directors, supervisors, managers, employees, and agents are third party beneficiaries of this Agreement."

In view of this close relationship between the Respondent and its clients, and the fact that the waivers in the arbitration agreement extended to the clients, the clients' managers and employees, it is appropriate that the Respondent's clients should be given the opportunity to post the notice at locations where the Respondent's employees are working.

The Respondent, having constructively discharged the Charging Party, Kimani Adams, must reinstate her and make her whole, with interest, for all losses she suffered because of the Respondent's unfair labor practices.

The General Counsel seeks, as part of the remedy, an order requiring the Respondent to reimburse Adams for all search-for-work and work-related expenses regardless of whether she received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period. To the extent that the General Counsel seeks a change in Board policy, the request should be directed to the Board.

The Respondent must revise its arbitration agreement to exclude all language whereby the signer waived the right to engage in protected, concerted activities and notify all employees who signed such agreements that those waivers have been rescinded and will not be enforced.

The arbitration agreements themselves include severability clauses stating, "If any provision of this Agreement is held to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and the adjudication shall not affect the validity of the remainder of this Agreement." Accordingly, the Respondent must maintain in effect the grievance arbitration procedure which it established and to which it agreed, but with the unlawful terms excised.

CONCLUSIONS OF LAW

1. The Respondent, E. A. Renfroe & Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by requiring its employees to sign, as a condition of receiving work assignments, an agreement whereby they waived the right, guaranteed to them by Section 7 of the Act, to engage in concerted activity for their mutual aid or protection.

3. The Respondent violated Section 8(a)(1) of the Act, during the time period February 17, 2016 through March 29, 2016, by maintaining provisions in its arbitration agreement which employees would reasonably conclude precluded them from filing unfair labor practice charges with the Board.

4. The Respondent violated Section 8(a)(1) of the Act by causing the constructive discharge of its employee Kimani Adams because she refused to waive rights protected by Section 7 of the Act, and to discourage other employees from refusing to waive such rights.

5. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the

entire record in this case, I issue the following recommended[18]

ORDER

The Respondent, E. A. Renfroe & Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Requiring its employees to waive their rights guaranteed by Section 7 of the Act, including the rights described herein, to engage in protected concerted activities for their mutual aid or protection, as a condition of continued employment.

(b) Terminating the employment of employees who refuse to waive their Section 7 rights, including the rights described herein, to engage in protected concerted activities for their mutual aid or protection, as a condition of continued employment.

(c) Creating the impression that employees cannot file charges with the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Revise the arbitration agreements which it requires employees to sign as a condition of employment to remove all requirements that employees, as a condition of employment, waive rights guaranteed by Section 7 of the Act (including those rights described in the notice to employees attached hereto, which include the rights of employees to act concertedly for their mutual aid or protection by filing lawsuits and/or grievances together and/or on behalf of other employees and the right to invoke procedures provided by the rules of court, including class action procedures deemed appropriate by the court) and notify all employees that such provisions have been removed, while otherwise maintaining in effect the grievance arbitration procedure established by these agreements.

(b) Offer immediate and full reinstatement to employee Kimani Adams and make her whole for any loss of earnings and other benefits suffered as a result of the unlawful action against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kimani Adams and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facilities in Birmingham, Alabama, copies of the attached notice marked "Appendix A."[19] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(e) Furnish signed copies of the notice to employees to each of its clients at which its employees are performing work, and request that each client post the notice in all locations where notices to employees customarily are posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 17, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

[18] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT require employees, as a condition of their employment, to waive any of their rights under the National Labor Relations Act, including the right of employees, acting in concert, to file lawsuits concerning terms and conditions of employment, including the right of one employee to file a lawsuit on behalf of and/or seeking a remedy for other employees, the right of employees, acting in concert or on behalf of other employees, to use procedures, including class action procedures, found appropriate by the court, the right of two or more employees to file joint grievances and of one employee to file grievances on behalf of other employees, to participate in the arbitration of other employees' grievances, to assist them in grievance arbitrations, and to act together with other employees for their mutual aid or protection.

WE WILL NOT maintain any provision in an arbitration agreement which reasonably would be understood by employees to prevent them from engaging in any concerted activities for their mutual aid or protection, including those described above, or which reasonably would be understood to prevent them from filing charges with the National Labor Relations Board.

WE WILL NOT cause the discharge of any employee for refusing to sign an agreement which reasonably would be understood to waive any of the employee's rights guaranteed by the National Labor Relations Act.

WE WILL offer immediate and full reinstatement to employee Kimani Adams and make her whole, with interest, for all losses of earnings and benefits which she suffered because of our unfair labor practices.

WE WILL remove from the arbitration agreements we require employees to sign, and from the grievance arbitration procedure established by those agreements, all restrictions on the right of two or more employees acting in concert to file a lawsuit against us or our clients, all restrictions on the right of one employee acting on behalf of other employees to file such a lawsuit, all restriction on the right of employees, acting together or on behalf of other employees, to use class action and other procedures deemed appropriate by the court, the right of employees to file or pursue joint grievances, the right of an employee to file grievances on behalf of other employees or seek a remedy for them, and the right of employees to participate in grievance arbitration proceedings, but will continue our grievance arbitration procedure, so modified, in effect.

WE WILL notify, in writing, all employees who have signed or who have been requested to sign an arbitration agreement, that we have rescinded the provisions which require them to waive their right to act jointly or collectively in the grievance arbitration procedure, including those rights described above, or which otherwise require them to waive a right guaranteed by the National Labor Relations Act.

E. A. RENFROE & COMPANY INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-171072 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.